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COMPENSATION TO RESCUERS.

A QUESTION OF CONTRIBUTORY NEGLIGENCE.

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There are few questions of law so colored with romance, daring and heroic deeds as this subject. The very idea suggests unselfishness and sacrifice far above the baser thoughts of monetary consideration. Sedate and dignified courts have plunged bravely into poetic eulogy even while drawing legal distinctions of microscopic proportions. And they seem, without dethroning the hero, to have settled fairly down upon the doctrine that "Negligence on the part of the defendant either toward the person rescued or the party making the rescue, *after the attempt had been begun,* is essential to a recovery in all cases," but that attempted rescue is not contributory negligence *per se*. *Evansville etc. R. Co.* v. *Hiatt.*[1]. In this case a son endeavored to rescue his father from the front of a moving train on a bridge. Recovery was denied because the employes of the railroad company did not or could not have observed either in time to prevent the accident. Of course, both parties were trespassers. In *Donahue* v. *Wabash R. Co.*,[2] the following well defined principle was established: "It is to be observed that it is only when the railroad company, *by its own negligence,* created the danger, or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person, and recover for an injury he may sustain in that attempt."

The liability of the defendant to this heroic plaintiff is the same

[1] 17 Ind. 102.

[2] 83 Mo. 560, 53 Am. Rep. 594.

as that towards the person he would rescue. There must be negligence on the part of the defendant (a) toward the person rescued, or (b) toward the party making the rescue after the attempt had been begun. If, therefore, the impending injury to the party was brought about by no negligence of the plaintiff, there could be no recovery by him nor by the rescuer unless the defendant showed negligence toward this third party, after he had injected himself into the affair. Defendant's obligation to him seems to be one of ordinary care and prudence after discovering his voluntary danger. Plaintiff's rights would seem to arise out of that great principle, "The duties of life are more than life."[3]

It therefore appears that the courts have securely bound their songs of praise with the girdle of the law. Though a life be given to rescue a trespasser, under circumstances over which the defendant had no control, and was in no sense negligent, "since the voluntary act sprang from magnanimity, maganimity must be relied upon in cases like this for reparation." *Saylor* v. *Parsons*.[4] It is just, however, that the defendant should be required to make amends to a would-be rescuer, as well as the party in danger, when the negligence of the defendant created the peril, and the heroism and self-sacrifice of the plaintiff brought about his own undoing in trying to prevent the evil consequences of that peril. Indeed, said the court in *Saylor* v. *Parsons*,[5] "Though history teems with accounts of heroic conduct and self-sacrifice, deeds of this kind have not become so common that they are to be anticipated as likely to occur whenever opportunity is afforded. . . . Because of their infrequency, however, it cannot be said they should enter into the calculations of men as at all likely in the ordinary transactions of life."

A LIMITATION.

There should be kept in mind, however, a limitation that works towards stripping valor of financial rewards since self-sacrifice is rarely, and heroic conduct seldom, accompanied by prudence and a lack of rashness. The New York courts praise and limit in these words:

"The law has so high a regard for human life that it will not

[3] Maryland Steel Co. v. Marney, 88 Md. 482, 42 L. R. A. 842.
[4] —— Iowa, ——, 64 L. R. A. 542.
[5] Supra.

impute negligence *to an effort* to preserve it, *unless made under circumstances constituting rashness in the judgment of prudent persons. Eckert* v. *L. I. R. Co.*[6] In *Penn. Co.* v. *Langendorf,*[7] it was said, "The principle seems to be well established that he who springs to the rescue of another, encountering great danger to himself, is not to be denounced as negligent, but that the propriety of his conduct is to be left to the judgment of the jury." So, if a financial value would be set upon heroism, the unromantic law injects its sordid rule against "rashness" and "unselfishness" and demands that the effort shall be made under circumstances not constituting rashness in the judgment of *prudent persons.* His only hope would seem to be that "the propriety of his conduct is to be left to the judgment of an admiring jury." But see, *Maryland Steel Co.* v. *Marney,*[10] where it is said to be a "mixed matter of law and fact."

This doctrine seems to be followed in *Linnehan* v. *Sampson;*[8] *Becker* v. *L. & N. R. Co.;*[9] *Maryland Steel Co.* v. *Marney;*[10] Thompson on Negligence,[11] and many other cases cited in the opinions.

A final analysis would seem to be that to entitle the plaintiff to recover, the defendant must (a) first be chargeable with negligence with respect to the person in danger, or (b) with respect to the plaintiff, arising after his efforts to rescue the person in danger commenced, and (c) plaintiff's effort must not have been made "under circumstances constituting rashness in the judgment of prudent persons," which (d) is to be passed upon by a jury as a matter of fact "with proper instructions from the court." As to which see, *Gaynor* v. *Old Co. Ry.*[12]; *Lane* v. *Atlantic Works;*[13] and *Rexter* v. *Starin.*[14]

WHAT IS RASHNESS?

If one is to take the words of the court literally, "in the judgment of prudent persons," the occasions wherein heroic and unselfish conduct may be financially (?) displayed, within the limits of the law, are rare indeed. The "hero" who waits to save a life until he can do so without "rashness" and "with the judgment of a prudent person," besides staying away from the scenes of danger,

[6] 43 N. Y. 502, 3 Am. Rep. 721.
[7] 48 Ohio St. 316; 13 L. R. A. 190.
[8] 126 Mass. 506, 30 Am. Rep. 692.
[9] 110 Ky. 474, 53 L. R. A. 267.
[10] 88 Md. 482, 42 L. R. A. 842.
[11] Section 198.
[12] 100 Mass. 208.
[13] 107 Mass. 104.
[14] 73 N. Y. 601.

will attend many funerals and at last, probably, be a studied-actor in a farce when he accomplishes his desired end. It has been well said[15] that "Men do not expose their lives to danger with the idea that others will protect them from harm by risking their own lives," nor do men, brave enough to risk their own lives to save another, study the consequences or measure the financial results. The word "unselfish" in such a case generally means utter abandonment of one's own interest, safety and comfort in looking solely for that of others. It is done upon the impulse of the moment. Indeed, the mind turns with abhorrence from any other spectacle. The very idea of rescuing one from danger suggests jumping into the same danger. It will, therefore, be interesting to review some cases in which "prudence" is defined or the rule explained "with reference to surrounding circumstances."

"SURROUNDING CIRCUMSTANCES."

In *Cottrell* v. *Chicago Co.*,[16] an engineer continued at his post in order to save his train. He might have jumped and been saved. The jury so found. The court, in reversing the jury, said, "This evidence presents an example of heroic bravery and fidelity to duty at the post of danger most praiseworthy and commendable, and an occurrence worthy of lasting record in the book of heroic deeds. . . . To hold as a matter of law in this case, that the deceased was guilty of a want of ordinary care and prudence, *as the engineer in charge of the locomotive* and the train, in not jumping off at this crisis and abandoning his engine, from the mere apprehension of uncertain danger, would set a legal precedent very dangerous to the railway service in life and property and by which it would be exceedingly difficult, if not impossible, to distinguish the cases and the circumstances in which it would or would not be the duty of an engineer to jump off and desert his engine, or to determine in point of time, when he should do so, and the necessity or prudence for him to do so." In other words, the time he should jump, if at all is not definable in law or fact. Such a response to the magic call of duty, stronger than the love of life, eliminating self-preservation, seems to have tempered the exacting version of contributory negligence with lienency.

In this behalf, however, see *Central R. Co.* v. *Crosby*.[17]

[15] Saylor v. Parsons, supra.
[16] 47 Wis. 634, 3 N.W. 376.
[17] 74 Ga. 737, 58 Am. Rep. 463.

In *Pennsylvania Co.* v. *Langendorf*,[18] it was said:

"Where another is in great and imminent danger, one who attempts a rescue may be warranted *by surrounding circumstances* in exposing his limbs or life to a very high degree of danger." Now comes a valuable interpretation of "rashness." The court, continuing, said, "And in such cases he should not be charged with the consequences *of errors of judgment* resulting from the excitement and confusion of the moment. In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that wrongfully exposed to danger the person desired to be rescued."

In *Buel* v. *N. Y. Cent. Ry.*,[19] it was said, "Where there is a sudden emergency, allowing but little time for deliberation, and the life of a fellow creature is in danger, it does not follow, as a matter of law, that in encountering danger to rescue life a person is necessarily guilty of want of reasonable care."

In *Louisville etc. Co.* v. *Lucas* (Ind.),[20] it was said: "Mere error of judgment in case of danger is not contributory negligence."

In *Pennsylvania* v. *Langendorf, supra*,[21] the plaintiff rushed in front of a train, negligently running very rapidly over a crossing, in order to save a little child and was hurt. The court said, "To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies." So, the formidable looking obstacle "in the judgment of a prudent person" loses its terror in "the just recognition of heroic conduct" when "viewed in the light of surrounding circumstances," because "the injury should be attributed to the party that wrongfully exposed to danger the person desired to be rescued."

In *Echert* v. *Long Is. Ry.*[22] a rescuer lost his life in jumping in

[18] 48 Ohio St. 316, 28 N. E. 172.
[19] 31 N. Y. 314.
[20] 6 L. R. A. 195, note.
[21] 48 Ohio St. 316, 18 L. R. A. 190.
[22] 43 N. Y. 502.

front of a rapidly moving train and throwing a small child from the track. A judgment in favor of his administrator was affirmed by the court of appeals. The doctrine set up in this case seems to be the same in the following cases: *Linnehan* v. *Sampson*[23]; *Donahoe* v. *Wabash Ry. Co.*[24]; Beach Con. Neg.[25]; Wharton Negligence[26]; Pierce Roads.[27] The following courts also decide that attempt to rescue is not negligence *per se*: *Carroll* v. *Minn. Co.*[28], *Penn. Ry.* v. *Roney*[29]; *Cottrell* v. *Chicago R. Co.*[30]

In *Maryland Steel Co.* v. *Marney*[31] it was said: "The proximate cause of injury to one who voluntarily interposes to save the lives of persons imperiled by the negligence of another is the negligence which caused the peril." In this case, a furnace worker in order to save the lives of several workmen, rushed into a place of danger in order to stop a flow of melting metal caused by the incompetency and negligence of a workman, and was permanently burnt and injured. This case is notable for this doctrine: "We go back of the direct cause to find a negligent act which made the injury probable, without which the accident and injury would not have occurred, and we charge such an act with the responsibility of the injury. This method of reasoning is in harmony with that of this court in *B. & P. R. Co.* v. *Reaney*,[32] as follows: 'In the application of the maxim, *In jure non remota causa sed proxima spectatur*, there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. . . . Courts do not indulge refinements and subtleties as to causation that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause in producing a given event or effect, though there be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned." It concludes that the heroic sacrifice would not have been necessary but for the negligence of the defendant, and such sacrifice having been made neessary, the defendant was as liable to the rescuer as it would have been to the persons saved by him from injury—an opinion that appeals to both reason and sentiment.

[23] 126 Mass. 506. [24] 83 Mo. 560. [25] p. 45, sec. 15. [26] Section 314. [27] p. 329. [28] 14 Minn. 57. [29] 89 Ind. 453. [30] 47 Wis. 634. [31] 88 Md. 482. [32] 42 Md. 136.

In the case of *Gibney* v. *State*[33] a father jumped into a river and was drowned in an effort to save his child that had fallen through an unguarded opening in a railing of the bridge on which they were passing. It was held that "the cause of the peril may be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition," though the immediate cause was the father's voluntary effort to save his child from drowning.

In *Linnehan* v. *Sampson*,[34] the court said: "The law does not require cowardice or inaction in such a state of things, and it does not follow as a matter of law that in encountering the danger he was necessarily guilty of a want of due and reasonable care." And in this connection, it would not be amiss to quote *Gaynor* v. *Old Colony Ry.*:[35] "What is ordinary or reasonable care is usually to be determined by the *judgment and experience of the jury,* and not of the judge."

The facts in *Becker* v. *L. & N. Ry.*[36] are colored by the unsuccessful but romantic effort of the young plaintiff to save the life of his girl companion. They were upon a railroad trestle when overtaken by a train which the employees negligently failed to stop. He refused to desert her, though he could easily have saved himself, but, on the contrary, remained to the last endeavoring to extricate her from her perilous position from between the timbers where she had fallen. The court said: "It is evident that it was the legal right, as well as moral duty, of the plaintiff to remain with and seek to rescue his companion, and, so far as that question is concerned, the law seems to be well settled that he was not guilty of any contributory negligence for remaining on the said bridge for the purpose of saving the life of his companion."

In *L. & N. Ry.* v. *Orr*,[37] it was said: Risking one's life in an effort to save the life of another cannot be said to be a rash or reckless act if the appearance justify a belief that he can effect a rescue, even though he shall also have reason to believe, and, *in fact, does believe,* that he may fail and receive grievous injury himself. In this connection we quote the Georgia court in *Cen. Ry.* v. *Crosby*:[38] "And the courts will not scan closely the grounds of hope a person may have in going into danger in order to save others, risking him-

[33] 137 N. Y. 1, 19 L. R. A. 365.
[34] 126 Mass. 506, 30 Am. Rep. 692.
[35] 100 Mass. 208.
[36] 110 Ky. 474, 53 L. R. A 267.
[37] 121 Ala. 489, 26 S. E. 35.
[38] 74 Ga. 737, 58 Am Rep. 463.

self in the effort, where the exigency demands instantaneous decision and action." A few cases like this would so cloud the atmosphere that none but a far seeing and diligent court could find it., way to contributory negligence.

In the case of *Corbin* v. *City of Philadelphia,*[39] a would-be rescuer was suffocated in a trench filled with deadly gas negligently left in a public street where he had gone to save another person that had fallen into it. The city was held liable.

In *West Chicago Street Ry. Co.* v. *Liderman,*[40] a mother was escorting a small child, leading it by the hand. She stopped to converse with a person and released the child's hand. "A moment later," as she testified, "she saw it upon the street car track and the car approaching at the usual rate of speed, some eighty or ninety feet away. She rushed in front of the car to save the child and was hurt." The testimony was conflicting as to whether the motorman could have stopped. The whole matter went to the jury as to her negligence and that of the motorman. The court said: "Negligence of a mother in letting go of her child's hand, in consequence of which the child gets upon a street railway, where she is injured in attempting to rescue the child, cannot be determined as a matter of law so as to preclude her from recovering damages on the ground that she was responsible for creating the dangerous situation in which she was injured, but is a question for the jury." The following cases, however, pronounce the issue in this case, "a fairly debatable question:" *Schierhold* v. *N. B. Co.*[41]; *Meeks* v. *So. Pac. Ry.*[42]; *Berkett* v. *Knickerbocker Ice Co.*[43]; *Slattery* v. *O'Connell,*[44] and *Creed* v. *Kendall.*[45] These cases furnish able discussions of the general doctrine of contributory negligence of the custodians of children that are permitted or escorted in exposed or dangerous localities.

EXCEPTIONS.

On the other hand, it has been decided in the case of *Condiff* v. *Kansas City Ry.*[46] "that voluntarily incurring danger to save *property* is not justifiable." This same doctrine was held in *Roll* v.

[39] 195 Pa. 461, 49 L. R. A. 715.
[40] 187 Ill. 463, 52 L. R. A. 655.
[41] 40 Cal. 447.
[42] 56 Cal. 513.
[43] 110 N. Y. 504, 18 N. E. 108.
[44] 153 Mass. 94, 26 N. E 430.
[45] 156 Mass. 291, 31 N. E. 6.
[46] 45 Kan. 256, 25 Pac. 562.

Northern C. Ry.[47] In *Hirschman* v. *Dry Dock*,[48] it was held: "The peril of the person sought to be saved must have been caused by negligence [and this doctrine] is emphasized in all cases. Leading cases are: *Donahue* v. *Wabash Ry.*[49]; *Gramlich* v. *Wurst*[50]; *Evansville Co.* v. *Hiatt*[51]; *DeMahy* v. *Morgans etc Co.*[52] (a splendid case). Michigan seems to be alone amongst the states that have passed upon the question declaring voluntarily incurring danger contributory negligence *per se*. Such seems to be the law in Canada, also, as laid down in *Connell* v. *Prescott*.[53]

CONCLUSION.

A general summary of the question of contributory negligence of a rescuer seems, therefore, to the Massachusetts court[54] to be free from difficulty. It likewise gives us a definition of "attendant circumstances." It was contended that the calls of humanity did not justify the risk and the point was directly in issue. It was held that the question, with all the surrounding circumstances, as to reasonable prudence and caution should go to the jury "as a question peculiarly for them to decide." "They were to consider all the circumstances, and, among other things, that the life of a fellow creature was in extreme danger; but they must have understood that reasonable prudence and caution were elements in the case which plaintiff must prove. . . . The emergency was sudden, allowing but little time for deliberation. Some allowance might well be made for the confusion of the moment. . . . The law does not require cowardice or absolute inaction in such a state of things. Neither does it require, in such an emergency, that the plaintiff should have acted with entire self-possession, or that he should have taken the wisest and most prudent course, with a view to his own preservation, that could have been taken. He certainly may take some risk upon himself short of mere rashness and recklessness." It will be seen therefore that the great majority of courts hold "it to be a question of mixed law and fact."[55] See, also, Shearm. & Redfield on Neg.[56] and *Spooner* v. *Del. L. & W. Ry.*[57]

[47] 15 Hun. 496, affirmed 80 N. Y. 647.
[48] 61 N. Y. Supp. 304.
[49] 83 Mo. 560, 53 Am. Rep. 594.
[50] 86 Pa. 74, 27 Am. Rep. 684.
[51] 17 Ind. 102.
[52] 45 La. Ann. 1329, 14 So. 61.
[53] 20 Ont. App. Rep. 49.
[54] Linnehan v. Sampson 126 Mass. 506, 30 Am. Rep. 692.
[55] Donahue v. Wabash, supra.
[56] Section 85.
[57] 115 N. Y. 22, 21 N. E. 696.

VIRGINIA LAW.

The Supreme Court of Virginia does not seem to have had before it the exact point at issue. We cite, however, a few cases interesting in this connection. In *Danville Ry.* v. *Hodnett*,[58] a general definition of negligence as a question of law and fact is given. Said the court: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or, the doing what such a person would not have done under existing circumstances. The duty is dictated and measured by the exigencies of the occasion. Whether there has been negligence in a given case is a question for the jury, under proper instruction from the court." The question of the burden of proof is stated in *Richmond Co.* v. *Allen*,[59] as follows: "Where . . . the plaintiff admits his contributory negligence, the burden is on him to show that, notwithstanding such negligence on his part, the defendant could, by the exercise of reasonable care, have avoided the accident."

In *Winchester* v. *Carroll*,[60] the court is allowed to define what a prudent person would do: "In as much as instructions are predicated on a hypothetical state of facts, when, from the facts assumed, it is manifest that *an ordinarily prudent person* would not have acted in the manner proposed, it is the duty of the court to tell the jury if they believe from the evidence that such conduct has been established, as a matter of law, it constitutes contributory negligence and bars a recovery."

In *Newport News* v. *Bradford*,[61] as to ordinary care, it is said: "It does not require one absolutely to refrain from exposing himself to danger. It does require, however, such watchfulness and precaution *to avoid coming into contact with danger* as a person of ordinary prudence would use under like circumstances for his own protection, in view of the danger to be avoided."

The question of "obvious danger" was passed upon in *Winchester* v. *Carroll, supra.* "If the unsafe condition of a city street is obviously and imminently dangerous, there can be no recovery if plaintiff is cognizant of that fact." Now, the court in *Hoffner* v. *C. & O. Ry.*,[62] followed in *Marpole* v. *N. & W. Ry.*,[63] held that "if

[58] 101 Va. 361.
[59] 101 Va. 200.
[60] 99 Va. 727.
[61] 99 Va. 117.
[62] 96 Va. 528.
[63] 97 Va. 594.

an employee knew or ought to know of the dangerous character of a(n) (overhead) bridge, although sight was dimmed by a fog, and fails to use ordinary care to protect himself, in consequence of which he is injured, he is guilty of contributory negligence." On the other hand, in *South West. Co.* v. *Smith*,[64] where a "boy under fourteen years of age was placed by employer's negligence where he must adopt a perilous alternation, or, where terrified by an emergency created by employer's negligence, he acted recklessly and consequently suffered, such reckless action is not contributory negligence." But, in *Richmond etc. Co.* v. *Picklesimer*,[65] it was said "he was guilty of an act of which no sensible man, in the exercise of ordinary care and caution, could be expected to be guilty. It was, in fact, a desperately rash act, superinduced by no imminent peril traceable to the negligence of the railroad company." See, also, same case reported in 85 Va. 798, the facts being that plaintiff endeavored to climb a ladder to the top of a cattle car after starting of train, it having been made necessary for him to ride on the top of the car by the dropping of the caboose in which he had been riding as a free passenger accompanying the car load of cattle.

In what light the Virginia court will view the "rescuer" with his "unselfish daring" remains yet to be seen, as well as the extent, in such a case, to which it will interpret the words, "the exigencies of the occasion," or the "surrounding circumstances," both, as has been shown, being a "mixed matter of law and fact," but lying much within the province of the court in Virginia.[66]

[64] 85 Va. 306. [65] 89 Va. 389. [66] 99 Va. 727.